

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
EchoStar Satellite Corporation
For Modification of
Ka-Band Authorization
IBFS:
SAT MOD-20000222-00061
SAT-MOD-20000222-00062
Call Signs: S2178; S2179

MEMORANDUM OPINION AND ORDER

Adopted: August 2, 2001

Released: August 3, 2001

By the Chief, International Bureau:

I. INTRODUCTION

1. By this Order, we deny the application of EchoStar Satellite Corporation ("EchoStar") to modify its Ka-band authorization to provide fixed satellite services ("FSS") in geostationary satellite orbit ("GSO") at the 83° W.L. and 121° W.L. orbit locations. As set forth below, we find that EchoStar's application to modify its system to add an additional 500 megahertz of spectrum for its uplink operations and 500 megahertz of spectrum for its downlink operations at both orbit locations was filed several years after the announced filing date for Ka-band applications and is therefore untimely. Further, we find that EchoStar has failed to establish grounds supporting a waiver of our processing round rules. In an order adopted today, we assign the 500 megahertz of spectrum at each of these orbital locations to a qualified entity that filed a timely application in the second Ka-band processing round.

II. BACKGROUND

2. The Commission opened the first Ka-band processing round in July 1995 ("First Round"). EchoStar filed an application for its Ka-band system prior to the September 1995 cut-off date. In May 1997, as part of the first Ka-band processing round, the International Bureau authorized EchoStar to launch and operate a GSO satellite system to provide FSS in the Ka-band. EchoStar's authorization

1 The terms "Ka-band" or "28 GHz band" refer to the space-to-Earth (downlink) frequencies at 17.7-20.2 GHz and the corresponding Earth-to-space (uplink frequencies) at 27.5-30.0 GHz.

2 See Celsat America, Inc., Application for Authority to Construct, Launch, and Operate a Ka-band Satellite System in the Fixed Satellite Service, Order and Authorization, DA 01-1682 (rel. August 3, 2001).

3 Public Notice, Report No. SPB-20, DA 95-1689 (rel. July 28, 1995).

4 EchoStar Satellite Corporation, Application for Authority to Construct, Launch, and Operate a Ka-band Satellite System in the Fixed-Satellite Service, Order and Authorization, 13 FCC Rcd 5664 (1997) ("EchoStar Authorization").

permits it to use 500 megahertz of spectrum in the 29.5-30.0 GHz band (uplink) and 500 megahertz of spectrum in the 19.7-20.2 GHz band (downlink) at the 83° W.L. and 121° W.L. orbital locations. This was the total amount of spectrum EchoStar requested in its application.⁵ EchoStar was afforded 30 days to decline the authorization. As set forth in the Authorization, failure to do so constituted formal acceptance of the authorization.⁶ EchoStar did not decline its authorization or seek reconsideration. Thereafter, in October 1997, the Commission opened the second Ka-band processing round (“Second Round”).⁷ It established a December 22, 1997 cut-off date for filing applications to be considered in the second round. EchoStar did not file an application by this date.

3. Instead, over two years later, on February 22, 2000, EchoStar filed an application to modify its Ka-band authorization. Specifically, EchoStar seeks authority to add 500 megahertz of spectrum (28.35-28.6 GHz and 29.25-29.5 GHz) for its uplink operations and 500 megahertz of spectrum (18.3-18.8 GHz) for its downlink operations.⁸ EchoStar states it did not seek 1000 megahertz of downlink spectrum in its initial application because there was uncertainty over what downlink spectrum would be available and thus it decided not to seek more than 500 megahertz each for its uplink and downlink operations.⁹ EchoStar further states it did not have the “lucky foresight” to request the precise amount of spectrum that was to become available.¹⁰ EchoStar asserts that its request is a minor modification pursuant to Section 25.116 (b) of the Commission’s rules, and therefore, should be treated as part of the first processing round.¹¹ EchoStar claims that the modification does not constitute a change in proposed frequencies or orbital locations to be used, but rather seeks the “full complement” of frequencies the Commission states is necessary to operate a GSO FSS system. It also states that its modification application does not increase the potential for interference and thus may be treated as a minor modification that does not require consideration in a separate processing round.¹² Alternatively, should the Commission determine that the application is a major modification, EchoStar seeks a waiver of the processing round rules. In claiming there is good cause to grant a waiver, EchoStar asserts that it will be able to use the spectrum more efficiently and in a faster time frame than any other second round applicant.¹³

4. Several first round licensees and second round applicants filed oppositions or comments in response to EchoStar’s application. Second round applicants CelSat America, Inc., Directcom Networks, Inc., TRW, Inc., Pegasus Development Corp., and Pacific Century Group (“PCG”) oppose the application,

⁵ *EchoStar Authorization*, 13 FCC Rcd at 5664.

⁶ *EchoStar Authorization*, 13 FCC Rcd at 5676.

⁷ Public Notice, SPB 106, DA 97-2202 (rel. Oct. 15, 1997).

⁸ Application of EchoStar Satellite Corporation for Minor Modification of its Ka-band Authorization, Filed February 22, 2000 (File No. SAT MOD-20000222-00061162) (“EchoStar Application”).

⁹ EchoStar Application at ii.

¹⁰ Opposition of EchoStar Satellite Corporation, Filed April 12, 2001, at 6.

¹¹ 47 C.F.R. § 25.116(b); EchoStar Application at ii.

¹² EchoStar Application at ii, 5.

¹³ EchoStar Application at 10.

claiming it is a major modification because it seeks new and additional frequencies.¹⁴ They also claim that no waiver of the processing round rule is warranted in this instance. Should the Commission consider the application, however, TRW asserts it must be as part of a third processing round.¹⁵ In addition, several applicants filed joint comments stating that grant of the application would adversely affect negotiations to resolve second round requests for orbit locations and spectrum.¹⁶ They note that the 500 megahertz of paired spectrum at 83° W.L. and 121° W.L. has been key in resolving second round requests for orbital locations. WildBlue Communications, Inc. (“WildBlue”), a first round licensee, filed comments in support of EchoStar’s application.¹⁷ WildBlue states that limiting EchoStar’s allocation to 500 megahertz per satellite will constrain EchoStar’s ability to provide competitive services to its customers.¹⁸ Further, WildBlue states that granting EchoStar’s request will result in an efficient use of the spectrum at the earliest opportunity.¹⁹

III. DISCUSSION

5. EchoStar requests that its modification application be considered part of the first Ka-band processing round. The cut-off date for applications for the first round was September 29, 1995. EchoStar file its modification application on February 22, 2000, over four years after the cut-off deadline. Quite simply, EchoStar’s application is grossly untimely. The Commission’s processing round procedures require applicants to file proposals prior to the established deadline to ensure orderliness, expedition and finality in the licensing process.”²⁰ In addition, these procedures serve important public purposes, including fairness among applicants and permits the rapid dispatch of Commission business.²¹ The Commission will waive deadlines only in extreme cases involving extraordinary circumstances.²²

¹⁴ Directcom Networks, Inc., Petition to Dismiss filed March 26, 2001; TRW, Inc., Consolidated Petition to Deny or Dismiss without Prejudice, filed March 26, 2001; CelSat America, Inc., Petition to Deny, Filed March 26, 2001; Pacific Century Group, Inc., Opposition to Application for Modification, Filed March 26, 2001; and Pegasus Development Corp., Petition to Deny filed March 27, 2001.

¹⁵ TRW, Inc., Consolidated Petition to Deny or Dismiss Without Prejudice, at 9.

¹⁶ Letter to Magalie Roman Salas, Secretary Federal Communications Commission from CAI DATA Systems, Inc., Pacific Century Group, Inc., TRW, Inc., CelSat America, Inc., Hughes Communications, Inc., Pegasus Development Corp., PanAmSat Corp. and Directcom Networks, Inc., dated March 26, 2001.

¹⁷ WildBlue Communications, Inc., Comments, Filed March 26, 2001 (“*WildBlue Comments*”). We note that EchoStar Communications Corporation, the parent company of EchoStar Satellite Corporation, holds 12.6% of WildBlue’s common stock.

¹⁸ *WildBlue Comments* at 4.

¹⁹ *WildBlue Comments* at 6.

²⁰ Petition of PanAmSat Licensee Corp. to Reopen the Ka-band Satellite Application Processing Round, *Order*, 11 FCC Rcd 5627 (Int’l Bur. 1996) (citations omitted).

²¹ *Id.* (citations omitted)

²² *Id.*

6. We reject EchoStar's assertion that it did not have the "foresight" to request 1000 megahertz of spectrum in each transmission direction in its first round application --spectrum it now claims is necessary to implement its business plan. Several applications listed in the 1995 Public Notice, inviting other applications to be considered in the first processing round, requested 1000 megahertz of spectrum or more in each transmission direction.²³ Indeed, in the *Notice of Proposed Rulemaking* issued concurrently with the cut-off notice, the Commission proposed to designate 1000 megahertz of uplink spectrum on a primary basis to GSO FSS systems.²⁴ While the Commission ultimately adopted a slightly revised plan for downlink spectrum from the one initially proposed, the final plan also designated 1000 megahertz of downlink spectrum for GSO FSS systems – 720 megahertz to GSO FSS on a primary basis and 280 megahertz on a co-primary basis to be shared with the terrestrial fixed service.²⁵ Prior to filing its modification in February 2000, EchoStar never indicated an interest in using more than 500 megahertz of spectrum for service uplinks or operating in any portion of the 17.7-18.8 GHz band, designated since 1997 for GSO FSS downlink operations. Furthermore, we note that EchoStar had other opportunities to seek this spectrum in a timely manner, including reconsideration of its initial authorization and filing an application in the second Ka-band processing round.²⁶ Thus, grant of EchoStar's request for additional spectrum is particularly unwarranted.

7. Nevertheless, EchoStar asserts the application is a minor modification under Section 25.116 of our rules that can be granted outside of a processing round.²⁷ This section of our rules, however, applies to amendments of *applications*, not modifications of licenses. In any event, if we were to apply this

²³ Public Notice, Report No. SPB-20, DA 95-1689 noting applications of Hughes Communications Galaxy, Inc., File Nos. 174-181-SAT/P/LA-95 (requesting authority to use 1000 megahertz for its proposed GSO/FSS system); Loral Aerospace Holdings, Inc., File Nos. 109-SAT-P/LA-95, 110 SAT-P-95 (proposing to use 1250 megahertz for its system); and PanAmSat Licensee Corp., File No. 117-SAT-AMEND-95 (proposing to use 2500 megahertz for its proposed system).

²⁴ Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Third Notice of Proposed Rulemaking and Supplemental Tentative Decision*, 11 FCC Rcd 53, 73 (1995).

²⁵ Stations operating in primary services are protected against interference from stations of "secondary" services. Stations operating in a secondary service cannot claim protection from harmful interference from stations of a primary service. "Co-primary" services have equal rights to operate in particular frequencies. See 47 C.F.R. §§ 2.104(d) and 2.105 (c). See also, Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Third Report and Order*, 12 FCC Rcd 22310, 22325-26 (1997), *Memorandum Opinion and Order*, FCC 01-172 (rel. May 25, 2001)(order on petitions for clarification or reconsideration).

²⁶ In the *28 GHz Band Plan*, the Commission noted that broadband GSO FSS applications proposed for this band can be supported within our total designation of 1000 Megahertz. Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *First Report and Order and Fourth Notice of Proposed Rulemaking*, 11 FCC Rcd 19005, 19029-30 (1996). ("*28 GHz Band Plan*"). Thus, EchoStar was made aware that 1000 megahertz of spectrum was available and had ample opportunity to file a timely request for additional spectrum.

²⁷ 47 C.F.R. § 25.116.

rule, EchoStar's application would undoubtedly be considered a major modification. An application is considered a major amendment if it increases the potential for interference, or changes the proposed frequencies - as does EchoStar's application.²⁸ Generally, if a major amendment is submitted after a cut-off date, the application loses its status in the processing group under Commission rules.²⁹ The rules provide an exception for applications that do not create new or increased frequency conflicts.³⁰ Because EchoStar's request - which seeks authority to operate on additional spectrum which must then be coordinated with satellites operating at orbit locations adjacent to EchoStar's satellites --does not fall within this exception, its application is ineligible for consideration in the first processing round.

8. Under our rules the Commission may grant a waiver where good cause is shown.³¹ Good cause exists where special circumstances warrant a deviation from the general rule, such deviation will serve the public interest, and a waiver would be consistent with the purposes underlying the rule.³² EchoStar claims that good cause exists since grant of its application will allow it to compete with terrestrial broadband services being offered by cable operators.³³ EchoStar states it can use the additional spectrum in its authorized Ka-band system without having to make a significant investment, and that it can have the spectrum in use years before any other applicant. Finally, EchoStar asserts that its use of the spectrum will not cause harmful interference to any authorized user.³⁴

9. The reasons cited by EchoStar in support of its waiver fail to demonstrate that departing from our processing round rules will serve the public interest. First, most of the Ka-band licensees and second round applicants are seeking to compete with terrestrial broadband services. Thus EchoStar's promise of increased competition is negligible. Second, we cannot rely on EchoStar's unsupported claim that it will make "first use of the spectrum." We note that the spectrum must be in use by the Commission's milestone deadlines and the ITU's "bring into use" dates, regardless of which entity is licensed to use it. Consequently, EchoStar's alleged efficiencies are not compelling in this context.

10. Third, granting EchoStar's application would undermine our processing round rules and policies. The Commission traditionally processes FSS space station applications in groups or processing rounds. This process allows us to consider competing applications for limited orbit locations concurrently

²⁸ 47 C.F.R. § 25.116(b)(1).

²⁹ 47 C.F.R. § 25.116(c). *See* Volunteers in Technical Assistance for Authority to Construct, Launch and Operate a Non-Voice, Non-Geostationary Mobile Satellite System, *Memorandum Opinion and Order*, 11 FCC Rcd 1358 (1995) *aff'd* 12 FCC Rcd 13995 (1997) (application for additional frequencies treated as ineligible for consideration as part of first round little LEO processing group but considered in second processing round).

³⁰ 47 C.F.R. § 25.116(c)(4).

³¹ 47 C.F.R. § 1.3.

³² *Wait Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); Intelsat, LLC, *Memorandum Opinion and Order*, 15 FCC Rcd 15460, ¶ 59 (2000).

³³ EchoStar Application at 10.

³⁴ EchoStar Application at 10.

and in an efficient manner.³⁵ It also promotes an orderly licensing process, which allows systems to be built and service initiated as expeditiously as possible. Therefore, reopening the first processing round is not in the public interest. A waiver for EchoStar would also disrupt the second processing round. Spectrum not authorized in the First Round was made available in the Second Round, and two applicants expressed an interest in the spectrum at issue.³⁶ Likewise, EchoStar's assertion of no interference pertains only to first round licensees and does not take into account systems that will be authorized in the second round. Consequently, granting EchoStar a waiver of our processing round rules is inconsistent with the purpose of the rules and a waiver is not justified.

IV. CONCLUSION AND ORDERING CLAUSES

11. Based on the foregoing, the applications of EchoStar Satellite Corporation for Modification of its Ka-Band Authorization, File Nos. SAT MOD-20000222-00061 and SAT MOD-20000222-00062 are DENIED.

12. This Order is issued pursuant to Section 0.261 of the Commission's rules, 47 C.F.R. § 0.261, and is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson
Chief, International Bureau

³⁵ See American Telephone and Telegraph Co. and Ford Aerospace Satellite Services Corp., *Memorandum Opinion and Order*, 2 FCC Rcd 4431, 4432 (1987).

³⁶ See Applications of CelSat America, Inc., SAT-AMD-19980123-00009, Filed January 23, 1998 and TRW, Inc., SAT-AMD-19971222-00229, Filed December 22, 1997.